

<b>STATE OF SOUTH CAROLINA</b>	)	<b>BEFORE THE CHIEF PROCUREMENT</b>
<b>COUNTY OF RICHLAND</b>	)	<b>OFFICER FOR CONSTRUCTION</b>
	)	
	)	
<b>IN THE MATTER OF: BID PROTEST</b>	)	<b>DECISION</b>
<b>ELECTRICAL INDEFINITE DELIVERY</b>	)	
<b>CONTRACT</b>	)	
<b>STATE PROJECT NUMBER U12-D042-BC</b>	)	<b>POSTING DATE: December 20, 2002</b>
<b>PALMETTO ENVIRONMENTAL</b>	)	
<b>GROUP, INC.</b>	)	
<b>vs.</b>	)	
<b>SOUTH CAROLINA DEPARTMENT</b>	)	
<b>OF TRANSPORTATION</b>	)	
	)	

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This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Palmetto Environmental Group, Inc. (Palmetto) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on Electrical Indefinite Delivery Contract (the Project) for the South Carolina Department of Transportation (SCDOT). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

#### **NATURE OF THE PROTEST**

SCDOT solicited bids for the indefinite delivery, over a two-year term, of electrical construction services. The bidding documents required the bidders to provide hourly rates for six separate categories of craft labor and unit prices for five items of composite electrical work. Each Line Item Amount was to be determined by multiplying the line item prices times an estimated line item quantity as provided by SCDOT. The Base Bid was calculated as the sum of the eleven Line Item Amounts. SCDOT opened four bids and posted a Notice of Intent to Award to Gregory Electric Company (Gregory). Palmetto protested the Intent to Award on the grounds that the bids submitted by Gregory and the second low bidder were unreasonably low and should be rejected as unbalanced.

## **FINDINGS OF FACT**

1. SCDOT issued the Bidding Documents on September 9, 2002.
2. The basis for the proposed contract was AIA A101-1997 and AIA A201-1997, with 00501-*OSE, Standard Modifications to AIA A101-1997* and 00811-*OSE, Standard Supplementary Conditions*. These documents state, in relevant part:

...

**4.3.9 Quantity Variations.** *If the quantity of a unit-priced item in this Contract is an estimated quantity and the actual quantity of the unit-priced item varies more than fifteen (15) percent above or below the estimated quantity, an adjustment, including overhead and profit, in the Contract Sum shall be made upon demand of either party. The adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. Any adjustment in the Contract Sum made pursuant to this Subparagraph shall be determined in accordance with Paragraph 7.5. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, as set forth in Subparagraph 4.3.7. Pursuant to Paragraph 13.13, the A/E shall determine the actual quantities of a unit-priced item used by the Contractor.*

...

### **13.13 UNIT PRICE WORK**

**13.13.1** *Where the Contract Documents provide that all or part of the Work is to be Unit Price Work, the initial Contract Sum will be deemed to include an amount equal to the sum of the unit price for each separately identified item of Unit Price Work times the estimated quantity of each item as identified in the Contract. The estimated quantity for each item of Work represents the Agency's best estimate of the amount of each item to be required of the Contractor, but the amounts are not guaranteed, and are solely for the purpose of comparison of Bids and determining an initial Contract Sum. Determinations of the actual quantities and classifications of Unit Price Work performed by the Contractor will be made by the A/E as described below. [emphasis added]*

**13.13.2** *Subject to an adjustment pursuant to Subparagraph 4.3.9, each unit price will be deemed to include an amount considered by the Contractor to be adequate to cover the Contractor's total costs, including overhead and profit, for each separately identified item.*

...

3. The Bidding Documents contained the state's SE-330 *Bid Form*, contains the following statement on page BF-1:

### **OFFER...**

**6. BIDDER** *herewith submits its offer to provide all labor, materials, equipment, tools of trades and labor, accessories, appliance, warranties and guarantees,*

*and to pay all royalties, fees, permits, licenses and applicable taxes necessary to complete the following items of construction work:*

**6.1 BASE BID WORK...** *Electrical repair and construction – Indefinite Delivery contract for Construction...*

4. On October 18, 2002 SCDOT issued Addendum 1 to the Bidding Documents, which added page BF-1A, which is attached and hereby made a part of this Decision. The bids received were as follows:

Line Item	Qty/Unit	Gregory Electric		Boykin Contracting		Burriss Electrical		Palmetto Env. Grp.	
		Unit Price \$	Line Item Total \$	Unit Price \$	Line Item Total \$	Unit Price \$	Line Item Total \$	Unit Price \$	Line Item Total \$
1	200 ea	42.26	8,452.00	10.00	2,000.00	90.00	18,000.00	380.00	76,000.00
2	200 LF	1.30	260.00	10.00	2,000.00	8.90	1,780.00	1.52	304.00
3	500 LF	0.34	170.00	2.00	1,000.00	6.50	3,250.00	1.00	500.00
4	100 ea	64.56	6,456.00	20.00	2,000.00	100.00	10,000.00	228.00	22,800.00
5	100 ea	60.00	6,000.00	5.00	500.00	82.00	8,200.00	280.00	28,000.00
<b>Subtotal 1-5</b>		<b>\$ 21,388.00</b>		<b>\$ 7,500.00</b>		<b>\$ 41,230.00</b>		<b>\$ 127,604.00</b>	
6	160 hrs	31.50	5,040.00	54.00	8,640.00	100.00	16,000.00	45.00	7,200.00
7	160 hrs	24.15	3,864.00	52.00	8,320.00	80.00	12,800.00	35.00	5,600.00
8	160 hrs	18.11	2,897.60	50.00	8,000.00	60.00	9,600.00	25.00	4,000.00
9	160 hrs	45.87	7,339.00	59.00	9,440.00	200.00	32,000.00	67.50	10,800.00
10	160 hrs	36.22	5,795.20	57.00	9,120.00	160.00	25,600.00	52.50	8,400.00
11	160 hrs	27.16	4,345.60	55.00	8,800.00	120.00	19,200.00	37.50	6,000.00
<b>Subtotal 6-11</b>		<b>\$ 29,281.60</b>		<b>\$ 53,320.00</b>		<b>\$ 115,200.00</b>		<b>\$ 42,000.00</b>	
<b>BASE BID</b>		<b>\$ 50,619.60</b>		<b>\$ 59,820.00</b>		<b>\$ 156,430.00</b>		<b>\$ 169,604.00</b>	

## **DISCUSSION**

### **PROTESTANT'S POSITION**

Palmetto argues that completion of the Bid Form requires the bidder to make assumptions about Line Items 1-5, which require pricing for an defined item of electrical work, in contrast to Line Items 6-11, which require only hourly rates for different types of workers. Palmetto contends that if a bidder assumed that Line Items 1-5 would never be used as a basis for payment, but the hourly rates would, then this assumption would allow the bidder to quote an artificially low amount for Line Items 1-5, and thereby create an unbalanced and unrealistically low Base Bid. Palmetto asks that the CPOC reevaluate the bids using the hourly rates only.

The CPOC requested Palmetto to provide any available substantiation for its claim that the lower two bids were unbalanced. Palmetto failed to do so.

### **RESPONDENT'S POSITION**

SCDOT contends that the bids as received are responsive and responsible. In support of its position, SCDOT provided the CPOC with its own estimate of the unit prices for Line Items 1-5, as follows:

Line Item	Qty/Unit	Unit Price \$	Line Item Total \$
1	200 ea	30.00	6,000.00
2	200 LF	1.50	300.00
3	500 LF	2.00	1,000.00
4	100 ea	30.00	3,000.00
5	100 ea	5.00	500.00
Subtotal 1-5			\$ 10,800.00

In addition, SCDOT, unlike Palmetto, submitted the unit price list from a recently expired indefinite delivery contract for electrical work.

### **CPOC FINDINGS**

Palmetto's essential argument is that the bids submitted by Gregory and Boykin are unbalanced, primarily by bidders' alleged speculation as to the accuracy of the SCDOT's quantity descriptions and estimates. To be "unbalanced" a bid must be both mathematically unbalanced and materially unbalanced. Mathematical unbalancing requires that the bid contain both overpriced and underpriced line items. If a bid is mathematically unbalanced the overall cost impact must then be assessed to determine that the unbalancing is material. A mathematically unbalanced bid is materially unbalanced if there is reasonable doubt that acceptance will result in the lowest price to the State. For an indefinite quantity contract, material unbalancing can occur if the bidder believes the actual quantities to be ordered will vary from the estimated quantities contained in the invitation for bids. In such cases, the bidder can submit artificially low prices for those items believed to be overestimated and artificially high prices for those items believed to be underestimated.

The Bidding Documents, in paragraph 13.13 of 00811-OSE, clearly states the basis for the determination of the apparent low bidder when using Unit Price Work. Subparagraph 4.3.9 of the 00811-OSE provides the basis for modification of the agreed-upon unit prices should there be any significant variations in quantity. Collectively, these clauses define how the State will identify the

firm with whom it will contract and how both the State and the contractor will be protected from the impact of substantial variations in quantities.

With respect to unbalanced pricing, in examining the bids it is clear there is a wide spread among the bidders on any given Line Item, however no single bidder is low—or high—on every item. The sum of the extended prices for Line Items 1-5 for the two low bidders are reasonably close to the SCDOT's own estimate and to the unit prices on a previous contract, which were either identical or reasonably comparable to those offered by Boykin and Gregory. The CPOC finds no reason to support a conclusion that Boykin or Gregory submitted unbalanced prices.

Palmetto argues that the Bid Form requires the bidder to make quantity assumptions regarding Line Items 1-5. The CPOC disagrees. While the argument made by Palmetto is theoretically possible, Palmetto provided no evidence to support a determination that SCDOT's quantity estimates are unrealistically high. The Bid Form clearly states a baseline quantity for these items and paragraph 13.13.1 of the 00801-OSE clearly state that this baseline value represents the agency's "...best estimate of the amount of each item to be required of the Contractor, but the amounts are not guaranteed, and are solely for the purpose of comparison of Bids and determining an initial Contract Sum." A bidder who chooses, for whatever reason, to ignore the state's explicit statements and submit a bid founded on an alternative view of the work required or its quantity, does so as its sole peril.

### **DECISION**

It is the decision of the Chief Procurement Officer for Construction that Palmetto Environmental Group, Inc. has failed to meet its burden of proof by the greater weight of the evidence that the bids as submitted by Gregory Electric and Boykin Contracting are unbalanced. Protest denied. The South Carolina Department of Transportation may proceed, within its programmatic needs, with the award of the subject contract.

IT IS SO ORDERED

A handwritten signature in black ink, reading "Michael M. Thomas". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Michael M. Thomas  
Chief Procurement Officer for Construction

December 20, 2000  
Date

### **STATEMENT OF THE RIGHT TO APPEAL**

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.